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No. 92-1082

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BLACK AND DECKER, INC.,
Petitioner,

v.

JERRY L. ROSS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF PETITIONER

MARK D. GATELY
MILES & STOCKBRIDGE
10 Light Street
Baltimore, Maryland 21202
(410) 727-6464
Counsel for Petitioner

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TABLE OF AUTHORITIES

CASES — Page

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 2, 7
Cole v. Control Data Corp., 947 F.2d 313 (8th Cir. 1991) 5
Doe by Doe v. B.P.S. Guard Services, Inc., 945 F.2d 1422 (8th Cir. 1991) 6
Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) 7
Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 7
Pacific Mut. Life Ins. Co. v. Haslip, 111 S.Ct. 1032 (1991) ..... *passim*
Robertson Oil Co., Inc. v. Phillips Petroleum Co., 930 F.2d 1342 (8th Cir. 1991) 6

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Respondent's brief in opposition is replete with procedural arguments that are both factually and legally incorrect. These arguments, incessantly repeated throughout respondent's lengthy 30-page opposition, are nothing more than a transparent attempt to avoid this Court's review of issues of obvious substantive importance. In distorting the record below and relying on tenuous procedural arguments, respondent makes no attempt to reconcile the demonstrated conflict as to the nature and extent of the post-verdict review of punitive damages awards required by federal courts exercising diversity jurisdiction after *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). Moreover, by ignoring the substantive grounds supporting Petitioner, Black & Decker (U.S.) Inc.'s ("Black & Decker") petition for certiorari, respondent concedes that the post-verdict re-

view of the punitive award by the Federal District Court for the Northern District of Illinois ("District Court") and the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") violates Black & Decker's fifth amendment due process rights and seventh amendment right to trial by jury. In short, respondent presents no reason for this Court to deny Black & Decker's petition.

1. Respondent claims that Black & Decker waived its right to *Haslip*-type post-verdict review of the punitive award in the District Court and the Seventh Circuit. Respondent seeks to divert this Court's attention from the uncontroverted fact that Black & Decker, unlike the petitioner in *Browning-Ferris Industries v. Kelco*, 492 U.S. 257 (1989), preserved at all levels its right to meaningful post-verdict review of the punitive award necessary to ensure compliance with the due process guarantees of *Haslip*.[1] In an attempt to justify what even respondent concedes is an "admittedly sparse" post-verdict review (Opp. 22), respondent resorts to blatant distortions of the record before the District Court. Respondent appends to his opposition Black & Decker's memorandum of law in support of its motion for judgment notwithstanding the verdict and alternative motion for a new trial. Respondent then represents to this Court that in this memorandum, Black & Decker "spent virtually no time discussing the question of punitive damages," and reasons that "the District Court's purported 'failure' to consider the non-arguments presented by Black and Decker is easy to understand." Opp. 23.

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[1] Indeed, respondent's reliance on *Browning-Ferris* in misplaced. Opp. 2. There, petitioner failed to raise its constitutional arguments before the district court, court of appeals and in its petition for certiorari to this Court. 492 U.S. at 277. In sharp contrast, Black & Decker preserved its constitutional arguments throughout the appellate process.

Far from being "tardily raised," (Opp. 2), Black and Decker dedicated five pages in its post-trial memorandum to the inappropriateness of the underlying punitive liability and specifically objected, in the alternative, to the punitive damages award on the grounds of excessiveness, and lack of proportionality to the conduct involved and the severity of the injury incurred.[2]

> Moreover, on the basis of the evidence in this case, the amount awarded was improper and bore no reasonable relationship to the conduct involved. The broad range of circumstances that may be taken into account by a jury in making a punitive damage award often invites the imposition of a large sum unrelated to the injury incurred . . . . Therefore, judicial scrutiny should be exercised in this case first, as to the imposition of punitive damages at all, and secondly as to excessive punishment. In the event that this Court does believe that punitive damages were properly allowed, the Court should enter a remittitur to reduce the level of punishment to an appropriate level.

Opp. App. 16 (citations omitted). Black & Decker expressly requested that should the District Court find punitive damages warranted under the evidence, it scrutinize the punitive award for excessiveness and lack of proportionality—factors deemed by this Court in *Haslip* as constitutionally mandated to ensure compliance with due process. *Haslip*, 111 S. Ct. at 1045. The District Court, however, ignored this request in denying Black & Decker's post-trial motions and upholding the punitive damages award. Pet. App. 22a-24a. While respondent purports to "understand" this omission, due process guarantees cannot even begin to countenance the failure of the District Court to conduct any post-verdict review of the sizable punitive award, especially in light of Black & Decker's

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[2] This section is captioned: "Punitive Damages Should Never Have Been Submitted To The Jury And In The Alternative, They Were Excessive." Opp. App. 13.

express request that it do so. Contrary to respondent's distortions of the record, alternative prayers for relief are not tantamount to waiver. Black & Decker plainly preserved its constitutional right to *Haslip*-style post-verdict review of the punitive damages award by the District Court.

2. Black & Decker specifically raised and preserved its constitutional objections and right to meaningful post-verdict review of the punitive damages award in the Seventh Circuit. Respondent concedes that Black & Decker's appellate brief before the Seventh Circuit specifically cited *Haslip* in support of its argument that the "award of punitive damages in this case 'violated the due process clause of the United States Constitution.'" Opp. 18. In highlighting the failure of the District Court to conduct any post-verdict review of the punitive damages award, Black & Decker stated in its reply brief:

> As the United States Supreme Court recognized in *Pacific Mutual Life Insurance Company v. Haslip*, —— U.S. ——, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991), this case denied Black & Decker due process because the trial court did not provide any guidance or otherwise provide a sufficiently definite and meaningful constraint on the jury's deliberations. Their unfettered award occurred because the court also allowed unrestricted evidence of post-manufacture events, standards, etc., which did not provide any procedural protections to adequately control the discretion of the jury in fashioning the award.[3]

Despite Black & Decker's renewed objection to the actions of the District Court, and request for *Haslip*-style post-verdict review in both its original and reply briefs, the Seventh Circuit, like the District Court below, disre-

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[3] Black & Decker attaches to the appendix an excerpt from its reply brief on appeal to the Seventh Circuit to demonstrate that contrary to respondent's assertions, Black & Decker pressed its constitutional arguments in the Seventh Circuit.

garded them. Given this omission, Black & Decker then submitted its Petition for Rehearing And Suggestion, In the Alternative, For Rehearing In Banc setting forth in detail the constitutional issues voiced below, describing the constitutional violations evident within the Seventh Circuit's opinion, and raising the questions now presented in its petition for certiorari to this Court. Thus, contrary to respondent's mischaracterizations, Black & Decker properly raised and advanced in the Seventh Circuit its constitutional objections to the punitive award and its request for *Haslip*-type review.[4]

3. To further divert this Court's attention from the substantive issues raised in the petition for certiorari, respondent premises his waiver contention on Black & Decker's purported failure to object to the District Court's jury instruction on punitive damages. In so doing, respondent misconstrues the basis of Black & Decker's constitutional argument. Black & Decker does not contend that an incorrect punitive damage jury instruction was given by the District Court. Rather, Black & Decker challenges the post-verdict review of the punitive damages award conducted in the District Court and Seventh Circuit.

Black & Decker's alleged failure to object to the jury instruction on punitive damages does not prejudice its due process rights to post-verdict review of the punitive damage award. Post-*Haslip*, the failure to object to a punitive damage jury instruction does not impair a litigant's constitutional right to meaningful post-verdict review of any punitive award. In *Cole v. Control Data Corp.*, 947 F.2d 313 (8th Cir. 1991), the Eighth Circuit held:

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[4] Respondent's unsupported recollection of the oral argument before the Seventh Circuit provides no basis for denying Black & Decker's petition. Indeed, the fact that the Seventh Circuit remitted the punitive damage award despite the purported and explicit "waiver" belies respondent's contention.

> Control Data argued generally that the award of punitive damages is unconstitutional, but made no claim as to the constitutional deficiency of the instruction. We are concerned, however, whether the district court has appropriately reviewed the punitive damage award. We believe that remand is required so that the district court may conduct this review under the standards that are articulated in *Haslip*, . . .

Id. at 320. Similarly, in *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991), the Eighth Circuit remanded the case to the district court to conduct a post-verdict analysis of the punitive damages award under Arkansas law and *Haslip*, despite the failure of the appellant to object to the punitive damages jury instruction. In remanding, the Eighth Circuit held it was "unable to evaluate the adequacy of the district court's review of the award" given that it "denied summarily" the motion to remit the punitive damages award. *Id.*; *see also Doe by Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422, 1428 (8th Cir. 1991) (remanding to district court for post-verdict review under Missouri law and *Haslip* despite lack of objection to punitive damage jury instruction).

Here, the District Court violated Black & Decker's due process rights by its cursory approval of the punitive award without any post-verdict analysis of whether that award comports with Illinois law and *Haslip* principles. The Seventh Circuit expressly recognized that the District Court "provided no further explanation of its reasoning" beyond stating "the award was not 'excessive or unreasonable under the evidence.'" Pet. App. 20a. By affirming the District Court's "admittedly sparse" review of the punitive award, the Seventh Circuit failed in its obligation to remand the case for further proceedings in the District Court. Black & Decker's alleged failure to object to the punitive damage jury instruction, therefore, is irrelevant to the obligation of the District Court to conduct the required post-verdict analysis of the damages

awarded under that instruction. The due process issue before this Court focuses solely upon the failure of both the District Court and the Seventh Circuit to conduct the required post-verdict review of the punitive award in derogation of Black & Decker's fifth amendment due process rights.

4. Black & Decker's assent to the punitive damage jury instruction does not waive its seventh amendment right to proper post-verdict review of the punitive award. As set forth in its petition for certiorari, the Seventh Circuit violated Black & Decker's right to trial by jury by employing methodology in direct conflict with that adopted by the Fourth Circuit in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), and *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992). Pet. 13-16. In *Hugo's Skateway*, the Fourth Circuit specifically held that the failure to object to the punitive damage instruction does not waive a litigant's seventh amendment right to have the trier of fact consider the post-verdict review criteria prescribed by controlling state law. *Id.* at 1415 n.5. In remanding the case for a new trial based upon the district court's violation of defendant's right to a trial by jury, the Fourth Circuit explicitly recognized that the defendant "has not contended that this instruction, based on Virginia common law, was erroneously given, . . ." *Id.*

Like the defendant in *Hugo's Skateway*, Black & Decker assented to the proposed punitive damage jury instruction. *Cf. Browning-Ferris Industries v. Kelco*, 492 U.S. 257, 280-81 (1989) (Brennan, J., concurring) (instruction not in error because it accurately reflected a Vermont law which, however, was probably unconstitutional). Unlike the Fourth Circuit, the Seventh Circuit failed to recognize that application of state law criteria not submitted to the jury through instruction violates Black & Decker's right to trial by jury. Constitutional error occurred because the Seventh Circuit, rather than the federal jury, made factual findings regarding how the

evidence introduced at trial satisfied, or failed to satisfy, the substantive requirements of Illinois state law. While the defects in the punitive damage instruction provided the predicate for the seventh amendment violation, the Seventh Circuit created the constitutional error. To avoid this constitutional error, the Seventh Circuit was compelled to follow the holding of the Fourth Circuit and remand for a new trial.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Black & Decker's petition for a writ of certiorari, this Court should grant a writ of certiorari.

Respectfully submitted,

MARK D. GATELY
MILES & STOCKBRIDGE
10 Light Street
Baltimore, Maryland 21202
(410) 727-6464
Counsel for Petitioner

February 8, 1993

APPENDIX

APPENDIX

Excerpt from Pages 13 and 14 of Reply Brief of Appellant Black & Decker filed in the United States Court of Appeals for the Seventh Circuit (Nov. 8, 1991)

Finally, BLACK & DECKER notes that Plaintiff does not dispute its argument that the award of $10,000,000 in punitive damages violated the due process clause of the Fourteenth Amendment to the United States Constitution. (Appellant's Br. at p. 35). As the United States Supreme Court recognized in *Pacific Mutual Life Insurance Company v. Haslip*, —— U.S. ——, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), this case denied BLACK & DECKER due process because the trial court did not provide any guidance or otherwise provide a sufficiently definite and meaningful constraint on the jury's deliberations. Their unfettered award occurred because the court also allowed unrestricted evidence of post-manufacture events, standards, etc., which did not provide any procedural protections to adequately control the discretion of the jury in fashioning the award. For instance, the court did not instruct the jury that evidence of post-manufacture changes should only be considered as to the issue of feasibility and not to punitive damages. Hence, the instructions to the jury did not act as a constraint on its discretion. Furthermore, as noted above, the award is unreasonable inasmuch as it was five times more than the amount of the Plaintiff's compensatory damages and there is no evidence that the conduct in question rose to the level of reckless disregard.